

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GERY M. FISHER

Claimant

VS.

CESSNA AIRCRAFT CO.

Self-Insured Respondent

Docket No. 1,022,386

ORDER

Claimant requested review of the April 11, 2007 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on July 20, 2007 in Wichita, Kansas.

APPEARANCES

John L. Carmichael, of Wichita, Kansas, appeared for the claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) concluded, based on the opinions of Dr. Chan and Dr. Brown, that the claimant has a 50.5 percent impairment to the left arm and a 32 percent impairment to the right arm. And because the claimant is not permanently and totally disabled, he is limited to these scheduled injuries¹ and subject to the \$50,000 statutory cap found in K.S.A. 44-510f(a)(4).

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

The claimant requests review the method of calculating his permanent impairment under present case law. While claimant concedes *Casco*² is now final thus limiting his recovery to two separate scheduled injuries, claimant maintains the permanent impairment ratings assessed by the ALJ are essentially appropriate but that she erroneously applied K.S.A. 44-510f(a)(4), thus limiting his recovery to \$50,000 for the totality of his injuries. Claimant maintains the appropriate method of calculating his loss is to apply the statutory cap individually to each separate scheduled member, rather in the aggregate.

In addition, claimant maintains he is entitled to additional medical treatment in the form of a preoperative cardiac evaluation based upon the uncontroverted medical testimony. This preparatory procedure would allow him to obtain further surgical treatment thereby relieving his ongoing bilateral hand symptoms and is, according to claimant, appropriate under K.S.A. 44-510h(a).

Respondent argues that the ALJ's Award should be affirmed in part and modified. According to respondent, the ALJ's decision to deny claimant the cardiac evaluation was proper under Kansas law, but the ultimate functional impairment is artificially high. Thus, respondent requests the Board modify the claimant's impairment to 10 percent to each arm. And to the extent the ultimate impairment rating is affected by K.S.A. 44-510f(a)(4), the respondent maintains the ALJ correctly interpreted that statute, thus capping claimant's recovery at \$50,000, independent of any temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant developed bilateral carpal tunnel syndrome while working for the respondent crawling on the interior of aircraft and doing sheet-metal work. The dispute stems from the causal connection between claimant's work, his symptoms, his resulting impairment ratings and whether he is entitled to an additional cardiac evaluation which would allow further treatment and potentially lessen his ultimate impairment rating.

Dr. Prince Chan, the respondent's designated treating physician, wanted to perform surgery on claimant's wrists but due to claimant's cardiac history, he would not operate until claimant had been evaluated by a cardiologist. Accordingly, claimant was referred to Dr. Alvarez who would not clear the claimant for surgery on his hands unless he had a cardiac catheterization.³ Respondent would not approve this procedure and following a

² *Id.*

³ R.H. Trans. at 10-11.

preliminary hearing, the ALJ concluded that respondent should not be required to pay for such a procedure.

As Dr. Chan was unwilling to proceed absent a cardiac evaluation and surgical clearance, he released claimant and rated him. Originally, he assigned a 10 percent permanent partial impairment to each upper extremity for both the carpal tunnel and cubital tunnel complaints.

As noted by the ALJ, Dr. Chan was cross examined about his rating and conceded that the bilateral 10 percent permanent impairment he assessed does not reflect claimant's *actual* impairment. Rather, it is his opinion that claimant's permanent impairment *would be* 10 percent to each upper extremity if claimant were to be treated.⁴ And this assumes claimant achieved a good outcome.

On cross examination, Dr. Chan was also asked to consider claimant's condition, as of the last time he saw him, and render an impairment opinion based solely upon the *Guides*.⁵ According to Dr. Chan, the *Guides* would indicate claimant bore a 49 percent permanent partial impairment to the left upper extremity and a 30 percent permanent partial impairment to the right upper extremity. But Dr. Chan found this to be "outrageous".⁶ He then suggested that using both his own experience as a hand surgeon along with the principles set forth in the *Guides*, claimant bears a 19 percent permanent partial to the left upper extremity and a 15 percent permanent partial impairment to the right upper extremity.

Claimant was also evaluated by Dr. C. Reiff Brown on January 9, 2006. Like Dr. Chan, Dr. Brown diagnosed bilateral carpal tunnel syndrome and bilateral ulnar cubital tunnel syndrome. He noted that because the claimant was unable to undergo surgery he was at maximum medical improvement (MMI) and assigned an impairment rating of 52 percent impairment to the left upper extremity and a 34 percent impairment to the right upper extremity. Admittedly this was high, but according to Dr. Brown this was done in accordance with the *Guides* and reflects the fact that claimant has not undergone treatment and cannot do so without the cardiac evaluation and clearance. He also testified that claimant's impairment could very likely be reduced considerably by surgical treatment.⁷

⁴ Chan Depo. at 20.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted. K.S.A. 44-510e(a).

⁶ Chan Depo. at 32.

⁷ Brown Depo., Ex. 1 at 3 (IME Report).

Claimant was also seen by Dr. Chris Fevurly on October 20, 2006. Dr. Fevurly concluded that claimant had bilateral carpal tunnel syndrome with moderately severe median nerve entrapment, left side greater than the right. He also went on to testify that while claimant bears a 10 percent permanent partial impairment to both upper extremities for the carpal tunnel complaints, claimant is not entitled to any additional impairment for his ulnar tunnel complaints as he does not believe such condition can ever be work-related.⁸ When asked, Dr. Fevurly agreed that claimant should have a cardiac evaluation before undergoing any surgical procedure for this condition.

Following the regular hearing and after reviewing the record as a whole, the ALJ concluded that her original determination as to respondent's responsibility for the cardiac evaluation was correct. And she went on to average the opinions of both Drs. Chan and Brown, who evaluated claimant's impairment based on his present condition, without the surgery, and assigned a 50.5 percent impairment to the left upper extremity and a 32 percent impairment to the right upper extremity. The ALJ specifically considered but rejected Dr. Fevurly's opinions on as he was out of step on the issue of causation with those expressed by the other two physicians.

The Board has considered these two issues, the claimant's permanent impairment and his need for further medical treatment, and concludes the ALJ's Award should be modified.

K.S.A. 44-510h(a), requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury."

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.⁹

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has held that what may not constitute medical treatment in one context, may in another. In

⁸ Fevurly Depo., Ex, 2 at 6 (IME Report).

⁹ K.S.A. 44-510h(a).

Hedrick v. U.S.D. No. 259,¹⁰ the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant's injury had resulted in paraplegia its holding might have been different.

Under these facts and circumstances, the majority of the Board concludes the ALJ's decision to deny the cardiac evaluation should be reversed and the procedure should be provided. There is no evidence within this record to suggest that claimant had been advised that he required the cardiac evaluation independent of his work-related injury. While it is undisputed that claimant had a history of a stroke and a heart attack, there is no indication that he requires this cardiac evaluation for any other reason than as a prerequisite for surgery. Indeed, the only evidence is that at least 3 physicians have determined that claimant requires this peremptory procedure before he can undergo the surgery to his hands. And it is uncontroverted that claimant requires the surgery due to his work-related injury. Therefore, the Board concludes respondent should provide the cardiac evaluation. The ALJ's Award is hereby reversed on this issue.

As for the claimant's functional impairment, the Board finds the ALJ's impairment findings, which were an average of Drs. Chan and Brown, were well reasoned and are affirmed. The Board is unwilling to accept an impairment rating that involves sheer speculation based upon treatment that has not been rendered or a recovery that has not occurred. Such permanent impairment opinions are not helpful.

Finally, the Board finds the ALJ's decision to cap the claimant's recovery at \$50,000 for the total sum of his impairments should be reversed. The pertinent statute, K.S.A. 44-510f, provides a maximum recovery of \$50,000 "for an injury or aggravation thereof." The Kansas Supreme Court's recent opinion in *Casco* makes it clear that the emphasis in this phrase is on the claimant's individual *injury or injuries* as they are now presumptively compensated as separate scheduled injuries. Thus, the Board finds that the statutory cap applies separately as well. Accordingly, claimant's recovery is not limited by the \$50,000 cap except as that cap relates to the individually scheduled impairments to each of the upper extremities.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 11, 2007, is affirmed in part, reversed in part, and modified as follows:

The claimant is entitled to 23.00 weeks of temporary total disability compensation at the rate of \$449.00 per week in the amount of \$10,327.00 followed by 94.44 weeks of permanent partial disability compensation, at the rate of \$449.00 per week, in the amount

¹⁰ *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

of \$42,403.56 for a 50.50 percent loss of use of the left arm, making a total award of \$52,730.56.

The claimant is entitled to 23.00 weeks of temporary total disability compensation at the rate of \$449.00 per week in the amount of \$10,327.00 followed by 59.84 weeks of permanent partial disability compensation, at the rate of \$449.00 per week, in the amount of \$26,868.16 for a 32 percent loss of use of the right arm, making a total award of \$37,195.16.

The claimant is also entitled medical treatment in the form of a cardiac evaluation, to be performed under the direction of a cardiologist.

All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned Board Members concur with the decision of the Majority that the medical procedure involving a cardiac evaluation, and possible stinting, recommended in the above matter, is necessary to assist in the treatment of claimant's bilateral carpal tunnel syndrome. Claimant developed bilateral carpal tunnel syndrome while working for respondent. It is undisputed that this condition arose out of and in the course of his employment with respondent. It is also undisputed that the respondent has a duty to

provide health care as may be reasonably necessary to cure and relieve claimant from the effects of his work related injury.¹¹

The Majority correctly points out the dilemma which may arise when trying to determine what constitutes reasonable and related medical treatment in any given situation. Here, a claimant with hand and wrist injuries, seeks a heart test/treatment which has been determined by claimant's health care providers to be necessary before the carpal tunnel surgery can be safely performed. Respondent understandably disputes the alleged connection between carpal tunnel syndrome in claimant's wrists and what appears to be a pre-existing heart condition. Respondent cites *Burnett*¹² as support of its position that claimant is not entitled to the heart catheterization procedure. However, in *Burnett*, the Board noted claimant's cardiologist, Tony J. Fornelli, M.D. in his letter of July 29, 1999 to claimant's attorney, stated that claimant had been earlier advised to have the blockages in his heart removed as they could be life threatening. It was this determination that the claimant in *Burnett* needed the heart procedure regardless of his "tarsal tunnel syndrome" that convinced the Board to deny the procedure.

Here, no such pre-existing warning existed. This claimant had not been previously advised to have the heart catheterization, nor had he been told that the procedures would be necessary regardless of the recommended carpal tunnel surgery. The only information in this record is that claimant needs the procedure in preparation for the carpal tunnel surgery. Had the pre-existing warnings present in *Burnett* been present here, the undersigned would, most likely, have followed its earlier precedent and denied the procedure. However, this case is materially different from *Burnett* for that very reason.

In Kansas, an employer takes an employee as it finds him.¹³ This claimant has a possible heart condition which puts him at risk for the procedures recommended by claimant's treating physicians. The evaluation and treatment of that heart condition is compensable only because claimant is in need of treatment for a work-related injury.

The Majority has allowed claimant to undergo the heart procedure as a form of treatment leading up to the carpal tunnel syndrome surgery. The undersigned concurring Board Members agree with the majority because this record does not establish that the procedure would have been medically necessary regardless of claimant's carpal tunnel syndrome.

¹¹ K.S.A. 44-510h.

¹² *Burnett v. Fiberglass Engineering Inc. and Wal-Mart*, Docket Nos. 220,246 and 223,942, 2003 WL 22401236 (WCAB Sept. 30, 2003).

¹³ *Bohanan v. Schlozman Ford, Inc.*, 188 Kan. 795, 366 P.2d 28 (1961).

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge